

appointed by the Court and that, as soon as they so paid the money, the debt became extinguished, and it does not matter what were the conditions of the contract.

Mr. Davies admitted that if the receipts had been produced the plaintiff would probably have had no case against the bank even though they paid the money to a person who obtained it by deceiving first the Court and then the bank. But it seems to me that when there is a condition precedent contained in the contract made at the time of the deposit the bank takes a risk if it fails to carry out that condition. The risk may be a very slight one but the fact that an indemnity was obtained seems to indicate that the existence of some risk was appreciated. In this case the risk has materialised since it transpires that the person who at the time occupied the position of legal personal representative had acquired that status by practising fraud upon the Court.

I cannot see how the plaintiff's claim can be refused. The deceased deposited money with the bank on the terms of a written agreement. One of those terms entitled her to think that as long as she kept the deposit receipts in her possession her money was safe and would not be paid out to anyone else. She kept those receipts in her possession and in due course her legal personal representative, the plaintiff, produced them to the bank when demanding payment on behalf of the estate. As far as the plaintiff is concerned it matters not that some third person by fraud obtained the money from the bank nor that the bank was entitled to regard that person as the person legally entitled. The deceased and her representative have carried out every part of the contract which the deceased made with the bank whereas the bank have failed on their part to carry out one of the conditions precedent. I have the utmost sympathy for the defendants who have been victims of a clever fraud, but in my opinion the plaintiff has made out his case for damages for breach of contract and his claim must succeed. There will be judgment for \$2,000 and interest as claimed and costs.

Judgment accordingly.

Solicitors: *Aubrey Davies & Co.; Rodyk & Davidson.*

CH'NG KIM HUAT v. HAMBURG-AMERIKANISCHE PACKETFAHRT-AKTIE-GESELLSCHAFT

[O.C.J. (Adrian Clark J.) July 6, 1936]
[Singapore Suit No. 256 of 1936]

Shipping and Navigation — Collision — Damage — Proceedings at Common Law — Filing of Preliminary Acts — Dispensation of.

In an action at common law for damages for the loss of a tongkang as a result of its collision with a steam vessel, it is unnecessary to file Preliminary Acts as required in Admiralty Suits.

SUMMONS IN CHAMBERS.

Spenser Wilkinson for the plaintiff (applicant).

[215] *Battishill* for the defendants (respondent).

A The facts and arguments appear sufficiently from the judgment.

Cur. Adv. Vult.

Adrian Clark J.: The substantial point raised in this summons is whether or not it is necessary for the parties to file Preliminary Acts in the suit in which the summons has been taken out.

B The plaintiff in the suit claims damages for the alleged loss of his tongkang as the result of a collision with the s.s. *Scheer* of the Hamburg Amerikanische Packetfahrt Actiengesellschaft. The collision is alleged to have taken place on the 15th April, 1936 off St. John's Island which is within the harbour limits of Singapore.

C The local agents for the Hamburg Amerika Company, the Straits Java Trading Company, having immediately given an undertaking to satisfy any judgment that might be given against the Hamburg Amerika Coy., it became unnecessary for the plaintiff to take any steps which would result in the arrest of the *Scheer* and she thereupon sailed away.

D In these circumstances the plaintiff, on the 10th June, 1936 issued a writ against the Hamburg Amerika Company addressing the writ to the company as "carrying on business within the Colony by their agents the Straits Java Trading Co. N.V. of Nos. 132/136 Robinson Road, Singapore."

E This writ was taken out intituled and entered in the cause book as an ordinary civil action and not as an Admiralty Suit.

Service of this writ was accepted by Messrs. Sisson & Delay who duly and without protest entered appearance for the Hamburg Amerika Company as defendants.

F The memorandum of appearance contains a notice that the defendants require the plaintiff to file and deliver a claim. Nevertheless, in correspondence between the solicitors for the plaintiffs and those for the defendants, the defendants claimed and the plaintiff denied that it was necessary that Preliminary Acts should be filed, and this summons was therefore taken out in order to settle that point.

G The original civil jurisdiction of the High Court of this Colony, under section 11 of the Courts Ordinance, 1934, includes the jurisdiction and authority, within the Colony, which was formerly exercised by the Courts of Queen's Bench, Common Pleas and Exchequer in England, and also the jurisdiction and authority of a Colonial Court of Admiralty conferred upon it by the Colonial Courts of Admiralty Act, 1890.

H Section 2 of the Act of 1890 conferred on Colonial Courts of Admiralty, broadly speaking, the same jurisdiction as was then possessed by the High Court in England in its Admiralty jurisdiction and sub-section (4) of that section provided that where any Court in a British possession exercises in respect of matters arising "outside the body of a county or other like part of a British possession" any jurisdiction exercisable under the Act that jurisdiction shall be deemed to be exercised under the Act and not otherwise. Had the collision, in this case, occurred on the

open sea it would have been necessary to consider the effect of the provisions of section 2(4) of the Act upon the point in issue but it is, I think, clear that a collision occurring within the harbour of Singapore does not occur "outside the body" of the Settlement.

The High Court of this Colony, therefore, although it does not sit in several divisions, possesses different powers and is bound to follow a different procedure and practice according to which of the different jurisdictions conferred upon it it is being asked to exercise.

If the High Court sits as a Colonial Court of Admiralty it will be bound by the Admiralty Procedure Rules and Forms approved under the Order in Council of the 3rd October, 1895, under rule 10 of which, in a suit for damages by collision, each party must file a Preliminary Act, and, under rule 12 of which, the suit will then proceed *without* pleadings unless the Judge shall otherwise order.

If the High Court sits as a Court of Common Law it will be bound by the Rules of the Supreme Court, 1934 which require pleadings to be filed, but in which there is no mention of Preliminary Acts.

Now it is clear that, however, the rights and jurisdiction of the Admiralty Court may have varied throughout its history, it had, long before 1890, acquired jurisdiction to try claims for damages arising out of collisions between vessels afloat on any part of the sea below low-water mark. It is also equally clear that the Courts of Common Law have always had jurisdiction to try all claims arising out of a tort if that tort is committed within the realm and (subject to certain restrictions which it is unnecessary in this case to consider) if it is committed on the high seas or even in a foreign country. A person suffering damage as the result of collision between two vessels could therefore seek his remedy either in one of the Courts of Common Law or in the Admiralty Court.

The result might be different, since the Courts of Common Law and the Admiralty Courts formerly followed different principles in assessing damages, but, since the Maritime Conventions Act, 1911, at any rate, this difference no longer exists.

The procedure was also different and, in certain respects remains different, especially in respect of the claimant's right to proceed, in the first place, *in rem* and to arrest the ship which he alleges to have been at fault.

With regard to the particular point in issue on this summons, however, the procedure, in England, has, since 1875, been the same, since, by Order 19, rule 28 of the Rules of the Supreme Court, in actions in any division for damage by collision between vessels (*quaere* even upon on inland lake?) Preliminary Acts must be filed.

[216] Although the bulk of Order 19 is reproduced in our Rules of the Supreme Court, 1934, we have, in this Colony, no provision similar to rule 28 of that Order, nor was any similar provision to be found in the Civil Procedure Code which was superseded by the Rules of 1934.

A Mr. Battishill on behalf of the defendants, has sought to call in aid the Preliminary Rule which provides that, where no provision for procedure is made the procedure of the Supreme Court in England shall be followed, but I do not think that that preliminary rule was intended to cover a case such as this. Procedure for common law actions is fully provided for, and separate procedure for actions in the Court of Admiralty, and I think I am bound to assume that the total omission of provisions similar to those in the English Order 19, rule 28 (which already existed when our rules came into being) was intentional and deliberate.

B Reference to the law reports in England and in this Colony seem to bear out the submission made on behalf of the plaintiff that it has always been open to a plaintiff to proceed in either jurisdiction and to adopt the procedure appropriate to that which he selects; and Mr. Spenser-Wilkinson, on behalf of the plaintiff, referred me to Suits 558-1933 and 239-1934 in which, although the point was not formally decided or raised, no Preliminary Acts were in fact filed and, apparently, no objection was taken to the omission to do so.

C In the present case the plaintiff has chosen to proceed by an action at common law and all the proceedings, by both parties, up to the present summons, have been consistent with that choice and with its acceptance without protest (were any such protest open to the defendants).

D It is true that the form of the summons, as it was originally drafted and filed, appears to be inconsistent with the plaintiff's contention, since it asks for an order that the filing of Preliminary Acts "be dispensed with" while, his contention being that they were never necessary, it should have been unnecessary, had he had the courage of his convictions, to ask for any such order. Mr. Spenser-Wilkinson has, however, explained that he only took out the summons because Mr. Battishill insisted that Preliminary Acts must be filed by both parties and he wished, therefore, to obtain the Court's direction on the matter. At the hearing Mr. Spenser-Wilkinson applied, without opposition from Mr. Battishill, and I ordered, that the summons should be amended to one including an application for an order that the filing of Preliminary Acts "be declared unnecessary."

E It may be well to refer to two other points.

H The first is that no objection has been taken to the legality or sufficiency of the service on the foreign Corporation who are named in the writ as defendants. The company is probably registered under section 290 of Ordinance No. 155 (Companies) and in any case Messrs. Sisson & Delay accepted service within the jurisdiction as solicitors for the company.

I The second point is one to which attention was not directed at the hearing and which I have noticed only on subsequently examining the record. The writ in this suit shows the Hamburg Amerika Company as the defendants who are sued, the notice of service shows Mr. Battishill as having been served as solicitor for those defendants, and the memorandum of appearance is of an appearance for the Hamburg

Amerika Company by Messrs. Sisson & Delay as solicitors for that company. The present summons and the affidavit in support of it, however, are entitled to show "The Straits Java Trading Co. N.V. agents for the owners of s.s. *Scheer*" as the defendants. Service of the writ appears to have been made directly on Hamburg Amerika Co.; that company should therefore, I think, be described in this summons as the defendants; and I give leave to the plaintiff, if he desires it, to further amend his summons, and the affidavit in support of it, accordingly.

On the summons itself my order is that the filing of Preliminary Acts is, in this suit, unnecessary.

The costs of this summons will be costs in the cause, and I give leave to the parties to apply, should it be in the opinion of either of them necessary to do so, further on this summons.

I have put in writing my decision on this summons because I was informed that it was desirable that the proper procedure in this kind of claim should be laid down. The question whether our rules should not be amended so as to include provisions similar to those of the English Order 19, rule 28 may nevertheless remain one suitable for consideration by the Rules Committee of this Court.

Order accordingly.

Solicitors: *Donaldson & Burkinshaw; Sisson & Delay.*

[217] F.M.S. REPORTS

MURUGAPPA CHETTY v. SEENIVASAGAM & ORS.

[C.A. (Thomas C.J., Terrell and Howes JJ.) March 3, 1936]
[Pahang Civil Appeals Nos. 1, 2 and 3 of 1935]

Land Code (Cap. 138) — Land registered in name of money-lender as security for loan — Analogy of mortgagee in possession — Civil Procedure Code (Cap. 7) — Amendment of plaintiff — Limitation — Public Servants (Liabilities) Enactment, 1897.

On the 6th April, 1931, S. and his wife borrowed from the plaintiff-appellant \$4,000 on a promissory note and deposited with him certain titles as collateral security. On the 1st June, 1932, S. and his wife executed in favour of the plaintiff-appellant another promissory note for \$3,500, which included the interest payable on the promissory note for \$4,000. On the 12th March, 1934, the plaintiff-appellant sued S. and his wife for the \$4,000 in Pahang Civil Suit No. 1 of 1934 and for the \$3,500 in Pahang Civil Suit No. 5 of 1934. No appeal was filed against the decision in the latter suit. The Court of Appeal held that in the former suit the plaintiff-appellant based his claim on the note itself but at the trial he applied to amend claiming on the consideration because the defendants-respondents had pleaded a material alteration in the note. The defendants-respondents consented to the amendment, reserving the right to raise the defence of limitation.

With regard to the other matters decided, the plaintiff-appellant purchased various rubber lands on behalf of the defendants-respondents and the latter executed promissory notes in favour of the former for the amounts expended by him. The titles to these lands were registered in the name of the plaintiff-appellant as security. At the time these transactions took place P., one of the defendants-respondents, was a Government servant in receipt of a salary of \$150 per month and 10 per cent. temporary allowance. The defendants-respondents entered into possession of these rubber lands, but the interest due on the promissory notes having

fallen into arrears, the plaintiff-appellant took over the lands in February, 1932. In Pahang Civil Suits Nos. 2 and 7 of 1934 the plaintiff-appellant sued on the various promissory notes and the defendants-respondents alleged that they had been wrongfully dispossessed of the lands, counterclaiming for damages for mismanagement and negligence. P. pleaded the Public Servants (Liabilities) Enactment, 1897.

The counterclaim in Pahang Civil Suit No. 7 was based on an alleged breach of a contract that the defendants-respondents should have possession of the lands while the counterclaim in Pahang Civil Suit No. 2 was based on the allegation that the defendants-respondents were the beneficial owners of the land.

The question was raised as to the assignment of rights by some of the defendants-respondents to S., but that question is not material to the report.

Held by Terrell J. and Howes J. (Sir Samuel Thomas C.J. dissenting) that the amendment to the plaintiff, which was made by consent, dated back to the date of the original plaintiff and therefore the defence of limitation failed.

Held further: that the 10 per cent. temporary allowance received by P. was part of his salary and therefore P. could not bring himself within the provisions of the Public Servants (Liabilities) Enactment, 1897.

Held further: that the true transaction between the parties was that the original occupation by the defendants-respondents was purely permissive and that the position of the plaintiff-appellant was analogous to that of a legal mortgagee, who has left the mortgagor in possession and is entitled to enter into possession himself at any moment, the mortgagor being treated as a trespasser or tenant on sufferance.

Held further: that it being alleged by the defendants-respondents that the plaintiff-appellant had mismanaged and neglected these rubber lands the defendants-respondents were entitled to an inquiry as to what acts of the plaintiff-appellant constituted gross negligence and an account, on the footing of wilful default, as to the amount due to them in respect of the plaintiff-appellant's gross negligence whilst in possession.

These three appeals heard together were against the decisions in Pahang Civil Suits Nos. 1, 2, 5 and 7 of 1934, the plaintiff-appellant being a money-lender and the defendants-respondents S., P., A. and N., all Government servants, and the wife of S.

Roland Braddell, the Hon. Mr. E. D. Shearn and R. Ramani for the plaintiff-appellant: As to Appeal No. 1 of 1935 the sole question is one of limitation. Suit dismissed on two grounds, viz. original plaintiff was a suit on the promissory note only and amended plaintiff barred by limitation. "Suing on the note" is a technical, not a popular expression and means putting nothing in issue except the note. We pleaded the facts, the promissory note and claimed the debt and the amendment to the plaintiff which was consented to, made this quite clear. Amendment dates back to the original plaintiff: *Patel v. Bai Parson*, I.L.R. 19 Bom. 320; *Malappa v. Neelama*, A.I.R. 1926 Mad. 487; *Nanjibhai Jethabai v. Popatlal Shriraj*, A.I.R. 1932 Bom. 367; *Satyanarainarao v. Venkataswami*, A.I.R. 1933 Mad. 156. But the trial Judge held amendment should not have been allowed in view of proviso to section 44 of Civil Procedure Code, 1918. (Now section 45 of Cap. 7). But never have Indian Courts considered suing on the consideration as inconsistent with suit on note: *Sarafalli v. Mahasukkhai*, A.I.R. 1933 Bom. 476; *Ramendra v. Kesab*, I.L.R. 61 Cal. 435; *Gopal Chand v. Thakurani*, I.L.R. 3 Cal. 314; *Farr v. Price*, 102 E.R. 22; *Labahadur v. Sheik Gulam*, A.L.R. 1933 Nag. 57. We also submit that in any event limitation is saved as the defendant acknowledges

the debt within the period because the acknowledgment in statement of defence is sufficient: *Dunichand v. Compton*, A.I.R. 1930 Bom. 187, 189.

[218] As to Appeals Nos. 2 and 3 of 1935 the transactions between the plaintiff-appellant and the defendants-respondents are of a well known form described in *Hogg* in his "Registration of Title to Land throughout the Empire" as the [218] giving of a "non-statutory security," which is analogous to an English mortgage. The rights and duties of a mortgagee in England arise by reason of any special provision of English law of real property. Therefore the juristic consequence of an analogous legal act follow as a matter of law by such analogy or by stipulation in a contract between the parties. If the person in whose name the land is registered goes into possession the remedies of the other party are (1) an account on the footing of wilful default and (2) claim for damages for gross negligence. The legal position is that ownership and possession go together unless the owner bound himself not to go into possession. Under any circumstances whatever he is always entitled to go into possession. The plaintiff-appellant held the lands as security and to effect that purpose he is the registered proprietor. The true legal position is set out in *Hogg* at pp. 289-295 and there is not a word in it as to possession. The right to possession is always there unless the proprietor contracted himself out of it: *Haji Abdul Rahman v. Mahomed Hassan*, [1917] App. Cas. 209, 211; *Abigail v. Lapin*, [1934] App. Cas. 491. No question of trust. A creditor is no more a trustee for his debtor than a mortgagee for the mortgagor: *P.M.N. v. Syed Alsagoff*, 7 F.M.S.L.R. 93, 99.

The defendants-respondents' right is a right *ex contractu*, it is not an interest in land. There cannot be an interest in land in the Federated Malay States unless it is on the register. There is no such thing as beneficial ownership—see section 42 of the Land Code. Section 43 reinforces the right of ownership by giving the right of possession. The trial Judge held plaintiff-appellant was a trustee and gave judgment for the *cestui que trust* against his trustee for trespass, which was never claimed. A mortgagee is not a trustee of the equity of redemption: *Warner v. Jacob*, 20 Ch. D. 220; *In re Spencer Wells*, [1932] 1 Ch. 380.

Re claim for damages one defendant-respondent claimed as assignee for others. But action had to be brought in the name of the assignor: *Motor Emporium v. Arumugam*, [1933-34] F.M.S.L.R. 21; [1933] M.L.J. 276. The right had not been perfected.

W. G. W. Hastings for the defendants-respondents: *Re* limitation the usual rule is that an amendment to the plaint dates back to the date of the plaint. In this case whether it should do so or not was reserved. The plaintiff-appellant could not have got the amendment. The defendants-respondents must have got on terms the amendment they asked. The matter was one for the Judge who made the amendment and he decided the effect of it. In fact the plaintiff-appellant did not amend—he could not: *Saminathan v. Palaniappa*, [1914] App. Cas. 618, 622, 623.

A The first issue is, was the plaintiff-appellant entitled to go into possession? He was not and the judgment is right. If the judgment is wrong a state of affairs outside the Land Code has been created. If the English law of mortgage applies then the plaintiff-appellant is correct and the trial Judge did not apply his mind to the question of gross negligence; but, in fact, the defendants-respondents claimed damages for negligence and it is submitted they are entitled to the same amount of damages whether plaintiff-appellant was a trespasser or not. Either he was a trespasser or his management of the estate during his period of management was negligent. There was evidence of gross negligence on which this Court could uphold the decision. But in fact he had no right to go into possession because he was a trustee.

B There was a contract between the parties and the terms were (1) an agreement to hold land in trust; (2) an agreement of loan; (3) an agreement to transfer. The terms of (1) preclude the plaintiff-appellant from going into possession. He has admitted that he was not the beneficial owner. The Court cannot imply a term of the contract that the plaintiff-appellant can go into possession if interest is not paid. It is clear from the act of the parties that it was agreed that the defendants-respondents should have possession at the start. The law will not imply a right which the statutory contract under the Land Code does not give. The remedies of the plaintiff-appellant are to sue on the contract of loan and having obtained judgment to sell the land at a fair price to satisfy it.

C *Braddell*, in reply: On gross negligence I have no case to meet. I am the owner in possession. They have not proved their contract nor set up a better title. An action for trespass by a mortgagor against a mortgagee will not lie: *Roby v. Maisey*, (108 E.R. 1228).

Cur. Adv. Vult.

D Thomas C.J.: These appeals which have been heard together by consent are in respect of four cases, viz. Civil Suit No. 1 of 1934; Civil Suit No. 2 of 1934; Civil Suit No. 5 of 1934 and Civil Suit No. 7 of 1934, which were heard together by consent before Burton J.

E Civil Suit No. 1 of 1934 and Civil Suit No. 5 of 1934 were consolidated. None of the other cases were consolidated. There is no appeal with regard to Civil Suit No. 5 of 1934. There are notices of cross-appeal in Civil Suit No. 2 of 1934 and Civil Suit No. 7 of 1934.

F The plaintiff in all the four suits is A. M. M. Murugappa Chettiar, a moneylender. He had financial transactions with Seenivasagam and the other defendants to the four suits extending over a number of years. These transactions were [219] independent of one another; but Seenivasagam took part in all of them. [219]

G Simpali Transactions—(C.S. No. 1/34 and 5/34).

H In 1917 Seenivasagam had purchased an estate, and this had been registered since 1927 in the name of his wife, Sinnamah. Subsequently he borrowed money from the plaintiff, and a promissory note was given which was renewed from time to time. Even-

tually a joint and several promissory note for \$4,000 was given on the 6th of April, 1931, by Seenivasagam and his wife, Sinnamah. Pahang Grant No. 1505 was deposited as collateral security. This is the promissory note sued upon in Civil Suit No. 1 of 1934.

There were other borrowings by Seenivasagam, and another promissory note was given which was renewed from time to time. Eventually a joint and several promissory note for \$3,500 was given by Seenivasagam and Sinnamah on the 1st of January, 1932. Pahang Grant No. 1504 and E.M.R. Nos. 108, 109, 1021 and 1042 were given as collateral security. This is the promissory note sued upon in Civil Suit No. 5 of 1934.

Pahang Grants 1504 and 1505 and Gali E.M.R. Nos. 108, 109, 1021 and 1042 together form what is known as the Simpali estate. Caveats were lodged against these lands by the plaintiff. The defendants to Civil Suits Nos. 1 and 5 of 1934 are Seenivasagam and Sinnamah.

Karak Estate — (Civil Suit No. 2 of 1934).

The title deeds to this estate are E.M.R. 2815, (2980, 2981, 2982) and E.M.R. 1502. The area is 27 acres 1 rood and 0 poles. E.M.R. 1502 was purchased by Seenivasagam out of his own moneys. For the purchase of E.M.R. 2815 the sum of \$4,000 was borrowed from the plaintiff.

Both properties were bought for Seenivasagam and Paramanather in partnership but registered in the name of the plaintiff. Seenivasagam and Paramanather gave a joint and several promissory note for \$4,000. There has been one payment of \$50.

Civil Suit No. 2 of 1934 is brought against Seenivasagam and Paramanather in respect of the amount outstanding in respect of this promissory note. Bentong Estate.

In 1927 a sixty-one acre estate in Bentong was acquired by Seenivasagam in partnership with others. The title deeds are Grant No. 995 and E.M.Rs. 1126 and 1528.

Seenivasagam stated in his evidence that nine acres were bought out of his own moneys, and that money was borrowed from the plaintiff in respect of the other forty-two acres.

The estate was acquired as to nine acres by Seenivasagam and Arumugam in partnership; and as to fifty-two acres by Seenivasagam in partnership with Navaratnam.

The whole estate was registered in the plaintiff's name. Promissory notes were given in connection with this transaction. Civil Suit No. 7 of 1934 refers in part to this transaction and in part to the Cheroh Estate which will be next dealt with.

Cheroh Estate.

This was purchased in 1929. The title deeds are Grants 2977 and 2845 and E.M.Rs. 581, 744, 745 and 748. The total acreage is 230 acres 0 roods 4 poles.

The whole estate was acquired by Seenivasagam, Arumugam, Karthigasu and Navaratnam in partnership. Part of the purchase money was obtained from the plaintiff.

The estate was registered in the name of the plaintiff. Promissory notes were given in respect of these transactions. This transaction is dealt with in Civil Suit No. 7 of 1934.

From this statement of the conditions surrounding the acquisition of the various estates, it is clear that in Civil Suits Nos. 1 and 5 the financial assistance was given after the land had been acquired, and that the title deeds were deposited by way of collateral security to the promissory notes.

In the financial transactions included in Civil Suits Nos. 2 and 7 of 1934, the loans were made at the time of the acquisition of the estates and promissory notes given, the land being registered in the name of the plaintiff as additional security.

As has already been stated, no appeal has been made from the judgment given in Civil Suit No. 5 of 1934.

With regard to Civil Suit No. 1 of 1934 the learned Judge held that an amendment of the plaint was necessary, that the claim dated from the date of the amendment and was therefore barred by limitation. The appeal relates to these two matters.

The question of amendment arose from it having been pleaded in the defence that the promissory note was void owing to a material alteration having been made. In anticipation that the defence would be sustained by the Court, an application to amend so as to add an alternative plea on the consideration was made at the trial. An amendment was made. This I will deal with later.

First of all I will consider whether an amendment was necessary. In any suit on a promissory note it is open for the plaintiff to sue in the alternative on the consideration for which the promissory note was given.

By sub-sections 42(d) and (e) of the Civil Procedure Code, (Cap. 7) a plaint is required to set out a plain and concise statement of the circumstances constituting the cause of action [220] and when it arose, and a demand of the relief which the plaintiff claims. [220]

Therefore it would seem not necessary to specifically set out a plea in the alternative, provided that the facts are set out sufficiently clearly so as to show the alternative cause of action. It would, however, be more desirable that it should be specifically stated that the claim is in the alternative and also that the prayer should ask for the alternative relief.

In this plaint it is stated that the defendant borrowed the sum of \$4,000 on the 6th day of April, and there is no prayer for relief in the alternative. I will assume, however, that this is sufficient compliance with the requirements of the Civil Procedure Code, provided the statement is correct.

The defendants pleaded that the transaction related to sums in respect of accrued interest, and asked to have it re-opened under the provisions of the the Usurious Loans Enactment.

In his reply the plaintiff admitted that the transaction related to sums in respect of accrued interest.

Therefore the statement as to the transaction in the plaint was admittedly incorrect. And consequently, in my opinion, the alternative claim, such as it was, disappeared.

The defence asked for the transaction to be re-opened on one ground only, viz., that it was usurious; there was no right to have the transaction re-opened on any other ground, since the transaction had not been pleaded as an alternative cause of action.

Therefore, in my opinion, at the commencement of the trial the plaintiff was suing on the promissory note alone without any alternative claim.

No doubt the plaintiff's advocate realised this position. At the trial he asked for leave to amend so as to plead the transaction on which the promissory note was based. This was not that the money had been borrowed, but that the money was due in respect of accrued sums of interest.

The learned trial Judge's note is as follows:—

"Mundell continues—

I have considered amendment of plaint in Suit No. 1 and I now agree to the amendment, and as Knowles says he is suing both on the note and the consideration for which the note was given. I ask leave to amend my defence as follows.

In so far as the plaintiff's claim is based on the consideration for which the note was given or on any ground other than the note itself the plaintiff's claim is barred by Limitation Enactment, 1896."

It has been argued that there was a consideration to the consent to the amendment, viz., the consent to an amendment in Suit No. 2. If in each case it was a question of costs only, then such arrangement could be understood, but if the amendment in the first case included the loss of the right to plead successfully limitation, then it is difficult to understand how the arrangement was arrived at without the express consent of Sinnamah, since her rights in the one case were being sacrificed in respect of advantage in a case to which she was not a party.

It was not stated definitely that any agreement had been arrived at, nor were any terms of the arrangement stated.

Moreover, under section 45 of the Civil Procedure Code (Cap. 7) there is a proviso to the effect that a plaint shall not be amended . . . by . . . the Court, so as to convert a suit of another and inconsistent character.

The consent removed the matter from the hands of the Court. The learned trial Judge says:—

"It would, I think, have been more correct to have argued this issue on the question whether or not the amendment should be made."

from which it would rather seem that apart from the consent of the advocate, the learned trial Judge would not have allowed it to be made. And in fact he says:—

"This clearly means that an amendment should not be allowed which would alter the position of the parties in such a way that the alteration could not be compensated by costs, and it is clear that no order for costs can counterbalance the loss of the right of the defence of limitation."

The learned trial Judge continues:—

"Mr. Mundell.....at the same time reserved the question of limitation."

The consequential amendment of the defence does not specifically deal with the question of the date of the amendment. But unless that was included in the reservation, the defence as to limitation would be meaningless. I am, therefore, satisfied that such was the intention of the parties, and that it was so understood by the Court; otherwise the learned trial Judge would not have noted down that the question of limitation was reserved.

Such being the case, I consider that the finding of the learned Judge was correct for the reasons which he has given, and that the claim is barred by limitation.

I now come to appeals in Civil Suit No. 2 of 1934. Before I consider the numerous grounds of appeal it might be well to deal with the cross-appeal which raises the question as to whether the second defendant was entitled to protection [221] under the Public Servants (Liabilities) Enactment, 1897.

To this an objection has been taken that a substantive appeal should have been brought. There is, in my opinion, some weight in this contention, but I am satisfied that the language used by Lindley M.R. in *The National Society for the Distribution of Electricity by Secondary Generation v. Gibbs*, [1900] 2 Ch. 280 applies with equal force. And adjusting the language of Lord Lindley, having regard to the mode in which the two were linked together, I think, in the circumstances of the case, the cross-notice ought to be treated, and I have accordingly treated it, as if it were a distinct notice of appeal.

The Public Servants (Liabilities) Enactment was in force at the time this contract was entered into, although it has since been repealed by Enactment No. 17 of 1930. By section 3 no action may be maintained upon any bill of exchange. There is a proviso to the section making it not applicable to any public servant who, at the date when the liability sought to be enforced was contracted, was in receipt of a salary of more than \$150 a month. Now, it has been shown that at the material time Paramanather was in receipt of a monthly salary of \$150, but he was further in receipt of a war allowance of 10 per cent. At certain periods he also drew remuneration for extra work.

The learned trial Judge has found that the allowance ought not to be excluded, for in his opinion, it was a sum paid in remuneration for the duties of the office, in addition to the original sums, because circumstances had arisen which made the original covenanted remuneration inadequate.

In the case of *The King v. Lyon*, [1921] 1 K.B. 203, the question of payments to officers employed in asylums in respect of additional duties undertaken by them was considered. It was open to the Court to have found that these payments were part of the salary of the officers concerned, but the Court came to the conclusion that they were emoluments, that is something outside the salary of the officers in question. The remuneration of officers is frequently made up by allowances of every description, such as free quarters, medical attendance, free passages, but the salary continues at a fixed sum irrespective of these other payments or advantages.

[221]

The word 'salary' is not defined in the Enactment, and I am of the opinion that it should be confined strictly to salary as such, especially having regard to the nature of the Enactment. Such being my opinion, I have to pass on to a consideration of the question whether the protection afforded by the Enactment is lost when a transaction of a commercial nature has been entered into. The learned trial Judge considered himself bound by the decision given in *Abdul Kadir v. Keap Kee & Co.*, 3 F.M.S.L.R. 201.

The report is of the most meagre description. The claim was in respect of advances of money and goods against sales of rubber. Goods are not protected by the Enactment. As no details are given, I am not prepared to say whether the whole amount claimed was or was not represented by goods which had been supplied, and the amounts advanced set off against the sales of rubber. I cannot for one moment think that the finding of the Court was intended to refer to the moneys advanced since the words of the Enactment are most explicit, viz.:—

"No action shall be maintained against a public servant upon any promise, express or implied, to repay money paid or advanced to him."

Without more information as to the facts in the case, I should consider it unsafe to accept it as a decision that the relief afforded by the Enactment is lost when commercial transactions are entered into. And in view of the very plain language of the Enactment, I am satisfied that the defendant, Paramanather is not liable in respect of the promissory note sued upon.

Therefore I conclude that the cross-appeal should be allowed and that the suit against Paramanather should be dismissed.

In the amended statement of defence to Civil Suit No. 2 of 1934 it is pleaded by Paramanather that he had assigned all the rights on the lands held by the plaintiff in trust for him to Seenivasagam. The plaintiff had full notice of the assignment, and is evidenced by the inchoate deed of release of 1934.

The intention as to the nature of the assignment was made clear, and it has further been borne out by the evidence given at the trial. In the absence of any Enactment or other provisions dealing with assignments, it would seem to be left to the Court to decide in each case whether an assignment has been made and the extent of that assignment. This is the course which the learned trial Judge has adopted, and I see no reason to differ from the conclusion at which he has arrived, viz.:—

"That the right to damages of all defendants against the Chetty vests in Seenivasagam."

Part of the money required for the acquisition of the Karak Estate was borrowed from the plaintiff. In addition to the promissory note sued upon, in the present case, as additional security the estate was registered in the name of the plaintiff. At the time of the transaction it was agreed that the defendants should have possession of the estate, and that they should have full control and management of the estate, from the time it was registered in the plaintiff's name.

[222] It has been argued that this transaction was akin to a mortgage. Mortgages are not recognised by any Enactment in this country. There is

A nothing to prevent parties from entering into contracts with reference to land—see *Haji Abdul Rahman v. Mahomed Hassan*, [1917] App. Cas. 209. In some respects that case was similar to the present since there was an agreement to re-transfer on the payment of the debt. There is, however, a limitation to the power of contract. Lord Dunedin said:—

B "It does not profess to prohibit and strike at contracts in reference to land, provided that such contracts cannot be construed as attempting to transfer, transmit, mortgage, charge or otherwise deal with the land itself." Section 55 of the Land Code, (Cap. 138) has language similar to that used by Lord Dunedin save that it omits the word 'mortgage'. Dealing is defined in section 2 of the Land Code, as follows:—

C "Dealing, with its grammatical variations and cognate expression means any transaction of whatever nature by which land is affected under this or any previous Land Enactment or Registration of Titles Enactment and includes a caveat." In the present case, however, the defendants claim to have a beneficial occupation, and if a contract were depended upon, it would seem that that would be a dealing in land. And if so it would not be permissible to enter into such a contract.

D But it has been argued that the transaction was in fact a trust whereby the plaintiff held the land as trustee for the defendants. The Land Code does recognise trusts. (See section 160 *et seq.*). The words 'as trustee' may be inserted in the memorandum. In practice the words are frequently omitted. The position of the immediate parties are not affected thereby, provided that no rights of third parties intervene. A trustee is defined in *Godefroi on Trusts*, 5th edn., p. 2 as one—

E "Who, while holding legal ownership or possession of, or dominion over the subject of the trust, is bound to allow the beneficial enjoyment or usufruct of the property to be reaped by another, who is called the *cestui que trust* or beneficiary." The evidence given as to the creation of a trust does not employ technical language, probably because of the ignorance of the parties as to such matters.

Seenivasagam said:—

F "It was agreed personally that I should have possession." And again:—

G "The agreement was that I should have full control and management of these properties from the time they were registered in the plaintiff's name. I claim that I was entitled to remain in possession whatever I did." And this evidence is supported by the fact that the defendants went into possession and remained in possession until they were dispossessed by the plaintiff.

H The learned trial Judge has believed Seenivasagam, and accepted this evidence. I can find no sufficient reason for disturbing that conclusion; and it is noticeable in this connection that in the amended statement of claim in Civil Suit No. 7 of 1934, the plaintiff pleads that the lands there in question were held by the plaintiff in trust.

I The condition of the trust was that the defendants should remain in possession. Until that right was determined by process of law, the trustee had no right to dispossess them. In doing so he was, in my opinion, committing a tort.

The word 'trespass' has been employed in the course of the case. The learned trial Judge has in fact found that there was a trespass committed. The

amended defence and counter-claim uses the expression 'wrongfully dispossessed', and the claim is for damages as compensation for damage caused by the plaintiff's mismanagement and neglect of the estate.

There was in my opinion a clear infraction by the plaintiff, not of the trust to be accounted for in connection with the trust, but of the right of the defendants to remain in possession. Therefore they are entitled to damages.

The learned trial Judge has assessed the amount to be awarded as damages in a lump sum, and this has been divided up amongst the various suits by the parties. I see no reason to disagree with the findings of the learned trial Judge. The defendants having been dispossessed are entitled to be reinstated. Therefore the order for possession was correct. This will not prejudice any further action by the plaintiff to enforce his rights to repayment of any sums which may be due to him.

Before I pass from this matter I might mention the argument that the plaintiff gained nothing by way of security in that the land was registered in his name. I am not by any means convinced that that argument is correct. There would not be the necessity to take any action to enforce the security by sale as would have been the case if a charge had been given. The defendants could not deal with the land in any way without the consent of the plaintiff. It is extremely unlikely that any person would be prepared to deal with the land at all, once that it was found that it was registered in the name of the plaintiff. But whether there was advantage or not would be for those who entered into the transaction to determine, and presumably there [223] would be an advantage since that method was adopted.

In Civil Suit No. 7 of 1934 the plaintiff sued in respect of transactions relating to the acquisition of the Bentong and Cheroh estates.

It is admitted that the plaintiff holds these properties in trust for the defendant to that suit in the proportions which have been set out in various receipts. The plaintiff claimed an account.

The defendant Seenivasagam pleaded assignments to him by Arumugam and Karthigasu. The defendants pleaded that they had been wrongly dispossessed, and claimed damages for mismanagement and neglect by the plaintiff.

The question of assignment has already been dealt with in regard to Civil Suit No. 2 of 1934: and it is not necessary to repeat what I have already said.

With regards to the Public Servants (Liabilities) Enactment the learned trial Judge has found that Arumugam and Karthigasu were in fact receiving salaries of less than \$150 a month. He has found, however, that owing to their having engaged in a commercial transaction they were not entitled to relief. For these reasons which I have already set out in Civil Suit No. 2 of 1934, I hold that these two defendants are entitled to relief from liability in respect of their promissory notes.

The question of the position under the trust is the same as in the previous suit (No. 2 of 1934), and

A I therefore hold that the learned trial Judge was right in this case also in awarding damages. The sum to be that which has been agreed between the parties.

The appeals of the plaintiff are, therefore, dismissed with costs. The cross-appeals are allowed with costs here and below.

B Terrell J.: It was agreed that these three appeals should be heard together. In the Court below the three suits Nos. 1, 2 and 7 of 1934, which are the subjects of these appeals, were heard together with Suit No. 5 of 1934. Suits 1 and 5 had been consolidated and carried on as one suit thenceforward known as Suit 1 of 1934. Suits 2 and 7, however, were never consolidated either with each other or with Suit 1 of 1934. The defendants are not the same, the issues are different and the pleadings, even in Suits 2 and 7 which have most in common, are by no means identical. I mention this as certain difficulties arose in the course of the appeal through the learned trial Judge having treated the four suits as if they were for all purposes a single suit.

D I will deal first with Suit 1 of 1934, the subject matter of Appeal 1 of 1935. In this suit the plaintiff originally sued Seenivasagam and his wife joint makers of a promissory note for \$4,000 with interest at the rate of 15 per cent. per annum. The note was dated the 6th April, 1931, and on the same day the defendants deposited with the plaintiff certain title deeds as collateral security. According to the findings of the learned trial Judge, which I accept, a few payments of interest were made during 1931, and on the 1st June, 1932, the two defendants executed a fresh promissory note for \$3,500 which included the interest payable on the promissory note for \$4,000. Accordingly time would not commence to run in respect of the promissory note for \$4,000 until the 1st June, 1932, and, as the plaint was issued on the 12th March, 1934, it was clear that no question of limitation arose upon the plaint as originally drawn.

Just before the hearing, however, it became evident that a material alteration had been made in the promissory note. It was common ground that the rate of interest agreed upon between the parties was \$1.15 per \$100 per month or 13.8% and not 15%. The defendants had raised this issue in paragraph 2A of their amended defence of the 13th December, 1934, and the plaintiff thereupon gave notice that he would apply to amend the plaint at the hearing so as to sue upon the consideration. Now it was argued on the hearing of the appeal that no amendment of the plaint was necessary, as the consideration had already been put in issue. On examining the original plaint, however, I am satisfied that the claim is based on the promissory note, and the promissory note only. In order therefore to enable the plaintiff to sue on the consideration it was necessary to amend the plaint so that a claim upon the consideration could be introduced either as an alternative to or in substitution for the claim on the promissory note. The amendment was made on the 29th January, 1935, and I think Mr. Hastings for the respondents was right in contending that such amendment substituted a claim on the consideration for the claim on the promissory note. It is not disputed that if time continued to run up to the

date of the amendment, the claim on the consideration was barred, and by a further amendment of the defence, also dated the 29th January, 1936, limitation was pleaded.

[224] It is now necessary to consider in greater detail the circumstances in which these amendments were made. In Suit 2 of 1934 Seenivasagam and one Paramanather were the defendants, the claim being in respect of another promissory note for \$4,000. The first defendant, however, counterclaimed, alleging that the plaintiff had been since the 1st February, 1932, in possession of a certain rubber estate at Bentong and had taken the profits thereof in reduction of the interest and principal due on the promissory note. He claimed an account of the profits received by the plaintiff from the said lands, and also [224] damages as compensation for the plaintiff's mismanagement and neglect of the lands since 1st February, 1932. He also claimed possession. Now it is obvious that the first defendant could never hope to succeed on his counterclaim as it stood. It omitted to mention that the plaintiff was the registered owner of the lands in question, or, as was later alleged, that the two defendants were the beneficial owners of the estate in question. Nor did it explain how the first defendant could sue in his own name in respect of a cause of action which must be vested, if at all, in the two defendants jointly. Accordingly the first defendant sought to amend his counterclaim in Suit 2 of 1934 by alleging in paragraph 2A that, although the plaintiff was the registered owner, the two defendants were the beneficial owners, of the lands in question until the 5th February, 1934, on which date the beneficial interest in the lands and the right to sue the plaintiff for damages became vested in the first defendant solely. He also asked to amend the prayer so as to include a declaration that the plaintiff held the lands as trustee for the first defendant.

It is to my mind perfectly clear that these amendments were vital to the first defendant's counterclaim, and that without them he could not have succeeded in the Court below as he did succeed.

Now, when the case first came on for hearing on the 28th January, 1935, counsel for the plaintiff applied to amend his plaint in Suit 1 of 1934 in accordance with the notice which had already been given. Thereupon Mr. Mundell for the defendants, who had already by consent put in an important amendment to the first defendant's counterclaim in Suit 7 of 1934 applied to make the amendments to the counterclaim in Suit 2 of 1934 referred to above. After discussion the consideration of these amendments was adjourned to the following day. It is to be noted that neither at this, nor at any later stage, was the plaintiff's amendment opposed on the ground that, if made, it would deprive the defendants of the defence of limitation which would be available to them if a fresh action had been brought.

On the following day the plaintiff's amendments in Suit 1 of 1934 and the first defendant's amendment in Suit 2 of 1934 were again considered. The following are the Judge's notes of what took place:—
"Mundell continues:—

A I have considered amendment of plaint in Suit No. 1 and I now agree to the amendment and as Knowles says he is suing both on the note and the consideration for which the note was given

I ask leave to amend my defence as follows:—

In so far as the plaintiff's claim is based on the consideration for which the note was given or on any ground other than the note itself the plaintiff's claim is barred by Limitation Enactment, 1896.

B Knowles agrees now to amendment of counterclaim in Suit No. 2."

and later the Judge's note (Mr. Mundell's final reply) is as follows:—

"As to Limitation:—

C If alteration (i.e. of the rate of interest on the promissory note) innocent the contract can be sued on. In such an event plaintiff's claim barred by Limitation unless amendment dated back to date of filing plaint. I submit the proper date is the date upon which the amendment was made."

The learned Judge has recorded therefore that Mr. Mundell on behalf of the defendants consented to the amendments and in view of what has been set out above, he was obviously not in a position to do anything else. If Mr. Mundell had adopted any other course, his proposed amendment to the counterclaim in Suit 2 of 1934 would have been opposed, and this amendment went to the root of the first defendant's claim for damages. Anyway Mr. Mundell did consent to the amendment, and the whole course of the argument, as recorded in the learned Judge's notes, shows that the only point which Mr. Mundell reserved was, not whether the amendment ought never to have been made, but whether the amendment having been made, the three years period of limitation ran, as a matter of law, to the date of the amendment (in which case the claim would be barred), or to the original date of the issue of the plaint (in which case the claim would not be barred). With all respect therefore to the learned trial Judge, it appears to me that the various authorities relied on by him as to whether or not in such circumstances an amendment ought to have been allowed are entirely irrelevant. Reliance was placed on section 45(i)(c) of the Civil Procedure Code which provides that a plaint may at the discretion of the Court be amended at any time before judgment upon such terms as to the payment of costs as the Court thinks fit, and upon the proviso to that subsection which reads:—

"Provided that a plaint shall not be amended.....so as to convert a suit of one character into a suit of another and inconsistent character."

H and the learned Judge has quoted the case of *P. R. Saminathan v. P. K. Palaniappa*, [1914] App. Cas. 618, which establishes that a suit on the [225] consideration is a different and inconsistent cause of action from a suit on a promissory note given for the same debt. I respectfully agree with the learned Judge that if the amendment had been opposed, it might have been refused, not only because costs alone would not compensate the defendants for being deprived of their right of pleading limitation, but also because the cause of action on the consideration is inconsistent with the cause of action on the promissory note. But in fact the amendment was neither opposed nor refused, and the matter cannot therefore be considered as if the point that had been reserved was whether the amendment should be refused or not.

The clear issue, therefore, is a perfectly simple one, namely, whether an amendment having been made, it dates from the issue of the plaint or from the date of the amendment. As regards the practice in England, there can be no doubt that the amendment would date back to the issue of the writ and the reason given in the various reported cases for refusing an amendment is that it would deprive a party of the defence of limitation. The Indian authorities are to the same effect and are more in point because the Limitation Enactment and the Civil Procedure Code of the Federated Malay States are based on the Indian Acts. In *New Fleming Spinning and Weaving Co. Ltd. v. Kessowji Naik & Others*, I.L.R. 9 Bom. 373 it is pointed out that when once an amendment has been made it dates from the institution of the suit. See also *Nanjibhai Jethabai v. Popatlal Shriraj*, A.I.R. 1932 Bom. 367, 369 and *Satyanarainarao v. Venkataswami*, A.I.R. 1933 Mad. 153, 156. The only authority to the contrary is the case of *Maharaja Manindra Chandra Nandi v. Rangalal Mondal*, 41 I.C. 728 where the plaintiff claimed possession of certain pieces of land, and the plaint was amended by the inclusion of other pieces of land. Woodroffe J. held that for purposes of limitation a new suit must be taken to have been filed as on the date of the amendment. It appears to me that the proper course in that case would have been to refuse the amendment and leave the plaintiff to bring another suit, and I cannot accept the case as an authority for the general proposition that where an amendment has been made which introduces a new cause of action, the limitation period runs up to the date of the amendment. Such a ruling would be inconsistent not only with a long line of decisions in the Indian High Courts but also with the express words of the Limitation Enactment. Section 3 of the Enactment reads as follows:—

"3. Subject to the provisions contained in sections 4 to 24 every suit instituted after the period of limitation prescribed therefor by the Schedule hereto shall be dismissed, provided that limitation has been set up as a defence."

A suit is only instituted once, and that is when the plaint is issued, and whatever amendment is made, that does not alter the date of the institution of the suit. Mr. Hastings in the Court of Appeal referred to the English case of *Rhondda Urban District Council v. Pontypridd Water Works Co.* [1908] 1 Ch. 388 in which the Attorney-General was joined as a plaintiff on the understanding that any relief he claimed should run from the date of the joinder and not from the date of the writ. This eventually is provided for in the Federated Malay States by section 21 of the Limitation Enactment which reads:—

"When after the institution of a suit a new plaintiff..... is substituted or added the suit shall as regards him, be deemed to have been instituted when he was made a party."

This section accordingly provides an express statutory exception to the general provisions of section 3. If an express provision was necessary in the case of an added party, the inference is that an express provision would also be necessary in the case of a different cause of action introduced by amendment, and in the absence of such a provision, I doubt whether there is even jurisdiction for the Court to make a condition in allowing an amendment which

would be contrary to the express provision of section 3. The point does not really arise, because, as stated above, no such condition was ever made.

There was one further argument submitted by the appellant and that was that in paragraph 2 of the first defendant's written statement the first defendant admitted the debt. This statement was signed by the first defendant and filed on the 30th April, 1934, and is *prima facie* an acknowledgment within the statutory period. No doubt an admission in pleadings does not revive a debt which is already statute barred at the date of the issue of the plaint, but if the amendment is to be treated as a new suit instituted on the 29th January, 1935, then the acknowledgment must be deemed to have been made in another suit instituted before the claim was barred and is available to the plaintiff. If on the other hand, the amendment is not a new suit, then it dates from the issue of the plaint, and no question of limitation arises.

For these reasons, I think that the defendant's plea of limitation in Suit 1 of 1934 fails, and that the appeal should be allowed.

Now, although as I have said, Suit 1 of 1934 was consolidated with Suit 5 of 1934, separate decrees were drawn up. Suit 5 of 1934 concerns the Simpali Estate in respect of which the plaintiff was never registered as owner, but merely had a registered lien. The learned trial [226] Judge held that when he took possession of this estate he was a trespasser. The plaintiff accepts this finding, and has lodged no appeal. This suit therefore need not be considered further.

I will now deal with the plaintiff's appeals against the judgments recorded in favour of the defendants upon their counterclaims in Suits 2 and 7 of 1934. The facts, except on one point which will be noticed later, are not really in dispute. Commencing in 1917 with the purchase of the Simpali Estate, the five defendants in these suits invested in rubber lands on a fairly large scale. Being Government servants this was contrary to Government regulations, and in order to cover up their activities the Simpali Estate was registered in the name of Seenivasagam's wife, the second defendant in Suit 1 of 1934. At first the defendants were able to finance the business themselves, but later when they purchased further estates (the Bentong Estate the subject matter of Suit 2 of 1934, and the Cheroh and Karak Estates, the subject matter of Suit 7 of 1934), they registered and obtained financial assistance from the plaintiff. When the new estates were purchased, they were all registered in the plaintiff's name, the plaintiff receiving promissory notes for the amounts advanced from time to time. The plaintiff had no charge upon or interest in the Simpali Estate until the 6th April, 1931, when the defendant Seenivasagam and his wife executed the promissory note for \$4,000 already referred to, and at the same time the second defendant deposited Grant No. 1505, being one of the title deeds of the Simpali Estate, with the plaintiff as security for the debt. On the 30th July, 1931, this deposit was protected by a caveat, and a lien under the Land Code was thereby created in favour of the plaintiff. The remaining title deeds of the Simpali Estate were also in the possession of the plaintiff but were not apparently subject to any lien or charge until

the 1st January, 1932, when it was agreed that they should be security for the sum of \$3,500 advanced on the security of a promissory note of that date. In October, 1933, and April, 1934, the plaintiff registered caveats and thereby obtained a lien over the lands in question. The promissory note for \$3,500 and the plaintiff's lien over the Simpali title deeds, other than Grant No. 1505, were the subject matter of Suit No. 5 of 1934 and are dealt with in the decree in that suit against which no appeal has been lodged.

When the title deeds of the estates (other than Simpali) were registered in the name of the plaintiff, the defendants entered into possession of the estates and Seenivasagam, who was the moving spirit, looked after them through a conductor named Ponniah. The defendants were not all equally interested in the estates; Seenivasagam's share appears to have been the largest. The plaintiff gave to each of the defendants one or more acknowledgments showing the amount due on promissory notes and setting out the particular interests of the defendants in the different estates registered in his name. The acknowledgments contained the following undertaking by the plaintiff:—

"Soon after you fully pay (and settle) both principal and interest we shall transfer at your expense either to you or to those who are authorised by you, these above said shares only after having received this receipt."

In 1930 and 1931 the price of rubber had fallen to an unremunerative level, and the defendants' payments on account of interest fell into arrears. Immediate action by the plaintiff was stayed off by the defendants in Suit 1 of 1934 giving on the 6th April, 1931, the promissory note for \$4,000 already referred to, and depositing the title deed of the Simpali Estate which had been previously unencumbered. Interest, however, again fell into arrear and on the 1st January, 1932, the defendants in Suit 5 of 1934 executed the promissory note for \$3,500 referred to above, to cover arrears of interest.

In February, 1932, however, Seenivasagam being then absent in Ceylon, the plaintiff took over the estates, other than Simpali, from Ponniah whom Seenivasagam had left in charge, and continued in possession until the issue of the plaint in Suits 2 and 7 of 1934. During this period, the learned trial Judge has found that the plaintiff mismanaged and neglected the estates, and has awarded damages to the defendants.

The position then was that although the estates were all registered in the plaintiff's name, the defendants had a right to call for a transfer of their respective rights and interests upon payment to the plaintiff of the several amounts due for principal and interest on the promissory notes. If then there was any right of action against the plaintiff for what he did in going into possession of the estates in February, 1932, or in mismanaging them afterwards, such right was a chose in action vesting in the two defendants in Suit 2 of 1934, and in the four defendants in Suit 7 of 1934 respectively, and the first difficulty that arises is that only the first defendant Seenivasagam counter-claimed for damages in Suit 2 of 1934 and only the first and fourth defendants in Suit 7 of 1934. It is true that by an assignment, dated the 5th February,

1934, immediately before the plaint was issued, the second defendant transferred to the first defendant his share in the Bentong Estate, but admittedly such assignment [227] did not purport to transfer to the first defendant any rights of action which had accrued to the second defendant in respect of the plaintiff's alleged mismanagement and neglect of the Bentong Estate. The defendants attempted to get over this by alleging in paragraph 2B of the counterclaim (as amended on the 29th January, 1935, and referred to above) that even if the assignment of the 5th February, 1934, did not in fact transfer any rights of action, that was what was intended. This allegation was supplemented by the viva voce evidence of the first and second defendants and accepted by the learned trial Judge.

So also in Suit 7 of 1934 it appeared that the second and third defendants had on the 4th December, 1933, transferred to the first defendant their shares in the Cheroh and Karak Estates, but such transfer also did not operate to assign to the first defendant any accrued rights of action against the plaintiff in respect of mismanagement or neglect. As in Suit 2 of 1934, the first defendant accordingly introduced by way of amendment on the 28th January, 1935, a new paragraph 12A, alleging that the assignments were intended to transfer such rights of action. This allegation was in its turn supported by the viva voce evidence of all the defendants and accepted by the learned trial Judge.

One of the grounds of appeal was that there was no valid assignment of the rights of the second defendant to the first defendant in Suit 2 of 1934, and no valid assignment of the rights of the second and third defendants to the first defendant in Suit 7 of 1934, and that in any case all the defendants should have been plaintiffs in the counterclaims respectively. It is difficult to see why the defendants in making their fourth and final amendment to their counterclaims after the hearing had actually commenced, did not take the precaution of making the several defendants in each suit nominal plaintiffs in the counterclaim. Such a course would have obviated at all events one of the many difficulties arising in this case. The defendants did not, however, adopt this course, and are accordingly faced with the argument that the alleged assignments are inoperative and invalid. As the English law on the subject has never been adopted in the Federated Malay States I see little use in examining the practice of the Courts in England with regard to assignment of choses in action either before or after the Judicature Act, or in inquiring into the subtle distinctions between legal and equitable assignments. There is admittedly no law on the subject in the Federated Malay States. See *Motor Emporium v. Arumugam*, [1933-34] F.M.S.L.R. 21; [1933] M.L.J. 276, and every case must be decided on its own merits. I think perhaps that there is substance in Mr. Hastings' argument that one of the objects of the rules established in England was to ensure that when a defendant is sued by an assignee, he shall be not sued again by the assignors in the event of the assignment being in any way defective. In the present case the assignors have precluded themselves by their pleadings, and by their viva

voce evidence, from disputing the assignments, and accordingly the plaintiff is in no danger of further claim on their behalf. On the whole, in view of the very unsatisfactory state of the law of the Federated Malay States on the subject, and in the peculiar circumstances of the present case, I am not prepared to differ from the findings of the learned trial Judge that the right to sue in Suit 2 of 1934 is vested in the first defendant and in Suit 7 of 1934 in the first and fourth defendants.

I now come to the main point of the case, which is, assuming that the plaintiff has been guilty of mismanagement and neglect while in occupation of the three estates, what is the true legal position of the parties, and what is the true measure of the plaintiff's liability. It will first be necessary to examine (a) the position taken up by the defendants in their pleadings as finally amended, (b) the submissions of counsel during the course of the hearing, and (c) the findings of the learned trial Judge.

As regards (a), the first defendant in Suit 2 of 1934 alleges that although the plaintiff is the registered owner of the Bentong Estate, the defendants were the beneficial owners, (and since 5th February, 1934, the first defendant has become the sole beneficial owner) of the estate, and that on the 1st February, 1932, the defendants were wrongfully dispossessed by the plaintiff. Subject to an account, the right to which is not disputed, the first defendant then claims damages against the plaintiff "as compensation for damage caused by his mismanagement and neglect." In the prayer to the counterclaim the first defendant asks for judgment for the balance on taking the account, possession, and a declaration "that the plaintiff holds the said lands as trustee for this defendant and that the Collector of Land Revenue, Bentong, be ordered to make the necessary entries in the relevant registers"—presumably for the purpose of registering the first defendant as proprietor.

[228] In Suit 7 of 1934 the pleadings took a different course. Whereas in Suit 2 of 1934 the plaintiff merely sued on a promissory note, and the first defendant in his counterclaim raised the issue of the plaintiff's possession of the Bentong Estate, in Suit 7 of 1934 the plaintiff himself set up that as a result of the finance supplied by him, he became the registered owner of the Cheroh and [228] Karak Estates on various dates, but did not claim to be the beneficial owner thereof. After alleging that he had received moneys *inter alia* from the sale of rubber, the plaintiff stated that no accounts had been settled and that the defendant refused to come to an account. The object of the suit on the plaintiff's part was therefore to have such account taken. He also asked for a declaration that he had a lien or charge on the various estates for such amount as might be found due. I find it difficult to understand how a registered owner can have a lien or charge on land registered in his name, and during the hearing of the appeal counsel admitted that no such interest could be registered under the Land Code. Paragraph 4 of the amended defence and counterclaim of the first defendant after admitting the allegation in the plaint that the plaintiff was the registered

A and the defendants the beneficial owners of the estates, proceeds as follows:—

"It was verbally agreed between the plaintiff and the defendants that the defendants should have possession of and cultivate the said lands and that they should have the right to sell the produce thereof and that in accordance with such agreement the defendants took and remained in possession of the said lands until February, 1932, when the manager of the defendants was wrongfully dispossessed of the said lands by the plaintiff and at such time this defendant was absent from this country. The plaintiff has since February, 1932, remained in possession of the said lands and has taken the produce thereof."

Then in paragraph 13 of the counterclaim the first defendant pleads a notice in April, 1934, requiring the plaintiff to deliver up possession of the lands, and in paragraph 14 the first defendant alleges mismanagement and neglect by the plaintiff, and claims damages and an account of profits. He also prays for judgment for possession and a declaration that the plaintiff held the lands as trustee, etc. similar to the declaration and rectification of the register asked for in Suit 2 of 1934. The defence and counterclaim of the fourth defendant in Suit 7 of 1934 are on exactly the same lines as the defence and counterclaim of the first defendant in this suit.

The important difference between the counterclaim in the two suits is that in Suit 7 of 1934 the first and fourth defendants both alleged that there was a verbal agreement that the defendants should have possession of and cultivate the said lands. In Suit 2 of 1934 no such agreement is alleged. In due course the plaintiff through his solicitors applied for particulars of the verbal agreement alleged in paragraph 4 of the first defendant's defence in Suit 7 of 1934. The particulars supplied read as follows:—

"Para. 4. The agreement was arrived at at Bentong between the defendants and the then agents of the A.A.M. firm (Sevugam Chetty and Sithambaram Chetty) on or about the various dates on which the various properties were purchased."

According to paragraph 2 of the first defendant's defence the estates were purchased on the 18th May, 1927, the 25th May, 1927, and the 6th August, 1929. If therefore the defendants had been held to their particulars, they should have proved agreements made between the four defendants and the two Chettiers on three separate occasions. As regards the possession of the Bentong Estate (Suit 2 of 1934), as no agreement for possession was alleged, no particulars were asked for.

In his amended replies to both suits the plaintiff alleges that it was the intention both of the defendants and of the plaintiff that the lands should be put into the name of the plaintiff so that he should have a security for the moneys advanced, and that it was not competent for the defendants to obtain a declaration that the plaintiff was a trustee so as to deprive the plaintiff of his security.

I Now, the defendants in both suits claim damages, and damages normally flow from a tort, but it is far from clear on the pleadings what kind of tort is alleged. The word 'trespass' is not mentioned, and possibly at that stage of the proceedings it was realised that, if the plaintiff was a trustee, he could hardly be a trespasser. At a later stage of the proceedings, however,

as will be seen, Mr. Mundell argued that the plaintiff was a trespasser, or liable alternatively, as a trustee or a mortgagee in possession. Finally he argued that the plaintiff was a trustee and a trespasser, and this position was in the main accepted by the learned trial Judge. But I am anticipating. The only allegation in paragraph 4 of the defence in Suit 7 of 1934, which would support a claim based on trespass is that the defendants were wrongfully dispossessed. It should be pointed out, however, that the word 'dispossession' is the word applicable in a suit for the recovery of land when the plaintiff being out of possession has to allege his title. No title to the land was ever alleged or proved by the defendants as against the plaintiff who being the registered proprietor has an indefeasible title under the Land Code. The word 'dispossess' is accordingly inapplicable.

[229] As regards (b), the arguments of counsel, the position taken up by the plaintiff has been consistent throughout. He says as regards the land he is the registered owner and under the Land Code the defendants have no interest there—[229] in whatever. He admits, however, that the defendants have a right *ex contractu* quite apart from the Land Code—a right to have the various properties transferred to them on payment of the principal and interest due on the promissory notes. Plaintiff submits that his indefeasible title under the Land Code gives him an immediate right to possession, and while admitting the original arrangement under which the defendants were permitted to have possession at the time of purchase, he says that the defendants have not even alleged—far less proved—any agreement by which he would be deprived of his *prima facie* right to enter into possession whenever he wished to do so. He argues that having entered his position is analogous to that of a mortgagee in possession, and that accordingly he might have to account on the footing of wilful default and be liable for gross negligence, but that this relief has never been asked for.

The defendants, on the other hand, shifted their position in the course of the hearing. On the 28th January, 1935, Mr. Mundell stated the legal position as follows, namely that as to the Simpali Estate the plaintiff was trespasser, and that as to the other estate, the plaintiff was like a legal mortgagee in England, entitled to take possession, he was liable to account on the footing of wilful default, and also liable for gross negligence. Then Mr. Mundell submits that by virtue of the original purchase, the plaintiff was also trustee and liable in a dual capacity, i.e. for gross negligence as mortgagee in possession, and also for ordinary negligence as a trustee. Mr. Mundell at this stage summarises his position as follows:—

"When Chetty took possession (it was) by virtue of the fact that he was registered proprietor. In England sole object of conveyance to mortgagee is to be security. In this case it was not only security but it made the Chetty a trustee for us.

As to Chetty's liability as registered proprietor he could not only take possession but also sell which (an) ordinary chargee could not do. And if instead of selling he takes possession and retains (it) he is responsible to us."

So far there is little difference in the legal position as stated by the plaintiff and the defendants. The

A plaintiff does not dispute the learned Judge's finding that he was a trespasser in respect of the Simpali Estate. As regards the other lands, the defendants admitted that one of the objects of the transaction was to give the plaintiff a security, that the plaintiff, by virtue of the fact that he was registered proprietor, could enter into possession or could sell, but that if he entered into possession he was responsible to the defendants. The only difference between the parties at this stage was Mr. Mundell's submission that by reason of the fact that the plaintiff was a trustee he would also be liable for ordinary negligence.

C On the 25th February Mr. Mundell restated his case. He now argued that the plaintiff was *prima facie* absolute owner, but that the equitable interests of the defendants would be recognised and that as the plaintiff was a trustee on their behalf, he could not exercise his right as absolute owner on his own behalf. He could not be considered a mortgagee or chargee because that would be inconsistent with the provisions of the Land Code. Accordingly the plaintiff was a trespasser. In the alternative, however, Mr. Mundell submitted that the plaintiff was a trustee and mortgagee in possession.

E In his final address on the 10th April Mr. Mundell again restates his position. He now emphasises the position that as the plaintiff is merely a trustee, the defendants were the beneficial owners, and that the plaintiff might be in the position of a mortgagee in possession, although he admits that the plaintiff got himself registered as absolute owner for the purpose of obtaining a security. He also makes an important submission on the question of onus. On that assumption that the defendants are the equitable owners he argued they are *prima facie* entitled to possession, and accordingly the onus was on the plaintiff to prove that he was entitled to possession.

G As regards (c), the findings of the learned trial Judge are that although the plaintiff was the registered proprietor with an indefeasible title, the beneficial ownership of the estate was in the defendants, that the transfer into the Chetty's name was taken by way of security for money advanced, and that notwithstanding the provisions of the Land Code the parties *inter se* must be bound by the actual contract made. He then deals with the contract which I will consider later. His final conclusions are as follows:—

H "If the Chetty had taken the land in his name and had not been owed money by Seenivasagam he would have been a bare trustee of the property and could have been compelled to transfer it to Seenivasagam at his request.

I But in fact the Chettiar took the transfer subject to the debt as set out in the so-called receipts attached to the plaint in Suit No. 7 and it follows logically that he would hold the land in trust for the defendants subject to the defendants' debt and in the absence of any special stipulation he would have no further rights. In other words he is in a position hardly distinguishable from a lienholder; [230] and if I am correct in this he had no more right to enter Cheroh, Bentong and Karak Estates than he had to enter on Simpali and in each case he is a trespasser."

The learned Judge has accordingly held that being a trustee 'subject to a debt' the plaintiff's position is analogous to that of a lien-holder, that as such he had no right to possession and accordingly was a trespasser.

I have examined the pleadings, the arguments of counsel and the findings of the learned trial Judge with a view to ascertaining whether there was any agreement as to what the actual transaction was intended to effect, and there can be little doubt that the object of registering the plaintiff as proprietor was to give him a security. This was of course the plaintiff's argument all along and was admitted by the defendants. The findings of the learned trial Judge also leave no doubt upon this point. At the very commencement of his judgment he says:—

"The defendants were Government servants, and as such forbidden to hold land as an investment; and the result was that instead of taking the transfer into their own names and giving a charge to the Chetty, they had the lands transferred into the Chetty's name without any trust of any sort appearing on the register. The object of this was beyond doubt to mask their breach of Government orders; and at the same time to give the Chetty security for the money he had advanced. But it is beyond doubt also on the evidence that the owners had possession and control of the property." and I have already quoted the passage which indicates that some sort of security was intended. In fact on a review of all the circumstances it is difficult to see what other object could have been intended. If the defendants had merely wished to mask the fact that they were acquiring rubber estates, they could have had the estates registered in the name of a nominee, as they did in the case of Simpali estate. The registration in the plaintiff's name cannot be divorced from the fact that the plaintiff advanced a large portion of the purchase price, and required some security beyond the mere promissory notes of Government employees, who were earning comparatively small salaries and were at that time *prima facie* protected by the provisions of the provisions of the Public Servants (Liabilities) Enactment of 1897.

If this was the object of the transaction, then, under the decrees pronounced in the lower Court, this object has completely failed. It is true that the learned Judge did not order rectification of the register, but apart from that the plaintiff has been deprived of any security whatever. He has all the liabilities of a registered owner with none of his privileges. He is not entitled to possession, and as Mr. Hastings argued, he would be guilty of a tort if he sold, though he added that if he sold at a fair price the damages would be merely nominal. His only legal remedy apparently would be to obtain judgment against the defendants and then attach the land in execution. Whether a plaintiff entitled to a money judgment could in fact register an attachment against land of which he was already the registered owner, is not a point which I am called upon to decide, but at least it is clear that the plaintiff would not be in a better position than any other judgment creditor, and that the land in question was not a security for his own particular debts. The point for consideration, therefore, is whether there is any reason under the law of the Federated Malay States or in the circumstances of the present case, why the avowed object of the parties could not be given effect to.

Now it is no part of the defendants' case that the Land Code alone governs the relations between the parties. If no transaction outside the Land Code

A could be recognised the plaintiff would have all the rights of a proprietor with an indefeasible title, and the defendants' contention would fail *in limine*. The defendants accordingly recognise that the Courts will take notice of equitable rights, and this is in accordance with the principle laid down by the Privy Council which has ruled that, notwithstanding registration of titles, the equitable rights of parties can in certain cases be given effect to, provided the interests of third parties do not intervene. *Loke Yew v. Port Swettenham Rubber Co., Ltd.*, [1913] App. Cas. 491.

The defendants therefore insist on their equitable rights against the plaintiff's registered title, but when the plaintiff tries to set up what the actual transfer was intended to achieve, namely a transfer by way of security, the defendants argue that it is not a charge within the Land Code, and accordingly invalid. They seek to set up another kind of equitable right, namely a trusteeship in their favour. But although the plaintiff might have been registered as trustee, he is in fact registered as absolute owner, and the defendants' argument therefore is likewise inconsistent with the statutory effect of an absolute transfer, and is subject to the additional objection that the undoubted object of the transaction was to give the plaintiff security for money advanced, and not to make him a trustee.

Now the Privy Council case of *Haji Abdul Rahman v. Mahomed Hassan*, [1917] App. Cas. 209, shows that there is nothing illegal in a transaction in which the land intended as security is registered in the lender's name, while there is a collateral agreement that on payment [231] of the debt the land should be transferred to the borrower. That case was decided under the provisions of the Selangor Registration of Titles Regulation, 1891. Section 4 of that Regulation reads as follows:—

F "All land.....shall be subject to this regulation and shall not be capable of being transferred, transmitted, mortgaged or charged or otherwise dealt with except in accordance with the provisions of this regulation and every attempt to transfer, transmit, mortgage, charge or otherwise deal with transfer, transmit, as aforesaid shall be null and void and of no effect....."

G Notwithstanding the stringent nature of this provision the Privy Council held that there was no objection to a transaction which was very similar to the transaction in the present case, the land being transferred absolutely to the creditor coupled with an agreement that the land should be retransferred on payment of the sum specified. At p. 124 the judgment of Lord Dunedin reads as follows:—

H "Now the agreement under discussion was not in the form of Schedule E, and therefore could not be and was not registered. It is therefore clear that it conferred no real right in the land, which remained after the transfer duly registered as the unburdened property of the defendant. But when that is said section 4 has no further application. It does not profess to prohibit and strike at contracts in reference to land, provided that such contracts cannot be construed as attempting to transfer, transmit, mortgage, charge or otherwise deal with the land itself. In other words, it is contracts or conveyances which, but for the section, might be held to create real rights in a party to the contract or conveyance which alone are struck at."

I and on the same page Lord Dunedin quotes with approval the following passage from the judgment of the learned trial Judge:—

[231]

"It is in fact an agreement to do something in the way sanctioned by the law. It is not an attempt to transfer, but a conditional promise to transfer."

It may be pointed out that the provisions of section 4 of the Regulation of 1891 are far more stringent than the provisions of section 55 of the Land Code which applies to the present case, in that, although the earlier part of the section is in substance reproduced, the words italicised are omitted. The principles, therefore, laid down in the Privy Council case apply *a fortiori* and the result would appear to be that although so far as the register is concerned the plaintiff is the absolute owner and the defendants have no right in the land whatever, yet by virtue of the collateral agreement they have some equitable rights which are binding on the plaintiff *in personam*, and which entitle them to obtain a transfer into their names when certain conditions have been fulfilled.

If the plaintiff's object was to obtain a security, that could also have been achieved by a registered charge under the Land Code, but an examination of the provisions relating to charges would appear to show that the security provided by a registered charge is somewhat inadequate, and that a chargee is under disabilities to which a legal mortgagee in England is never subjected. For instance, although under section 135 the chargee can in case of default, give notice to the occupiers or tenants to pay the rents to him, he cannot enter into possession of country land, unless default is made in the maintenance and cultivation of the land, and then only after application to the Collector. Again he cannot sell without applying to the Court, and following the rather complicated procedure laid down in section 138 and the subsequent sections. If then a lender gets himself registered as absolute owner instead of as chargee, it is clearly with the object of giving himself a better security and avoiding the restrictions and difficulties imposed upon a chargee under the Land Code. It is I think not without significance that in the Federated Malay States the Public Trustee, who is a Government officer, whenever he lends money on the security of land, has the land registered in his own name. The Court was so informed during the course of the hearing of the appeal and the statement was not disputed.

An analogous case is that of *Abigail v. Lapin*, [1934] App. Cas. 491, decided in connection with the Registration Act of New South Wales. In that case land was conveyed to a creditor. In form the transfer was absolute, and there was no trust or caveat registered, though in fact *ex contractu* other parties were interested. The Privy Council held that the transferee had all the rights of an absolute owner except in so far as he had contracted himself out of them. A similar principle was followed in these Courts by Sir L. Elphinstone C.J. in the case of *The Money Lending Firm of P.M.N. v. Syed Alsagoff*, (7 F.M.S.L.R. 93), where also there had been a transfer of land, absolute in form, but actually by way of security. The learned Chief Justice held that the borrower had no claim to the land, but merely a contractual right.

In my opinion these principles should be applied to the facts of the present case. If a legal mortgagee in England whose interest is qualified on the face of

the deed by the proviso for redemption is entitled to possession as of right at any time and irrespective of default (see *Halsbury*, Vol. 21, p. 189, par. 349), it is to [232] be presumed that the rights of an absolute owner are certainly no less. Admittedly under the Land Code a proprietor has absolute dominion over his property, and I conclude therefore that he is *prima facie* entitled to possession and to sell except so far as his rights have been qualified or restricted by some contract quite outside the Land Code, but binding on the parties *in personam*.

If I am correct in this view of the transaction, then the onus is on the person claiming the equitable interest to satisfy the Court in what way and to what extent the registered owner's rights are restricted.

This brings me to a consideration of what was the actual contract between the parties. As to one important matter there is no dispute whatever, namely that there was an obligation on the part of the plaintiff to transfer the land to the defendants as soon as the principal and interest owing to him was paid. This part of the contract is contained in writing and incorporated in the receipts attached to the plaint in Suit 7 of 1934. Any verbal variation of this contract must presumably be subject to the provisions of section 91 of the Evidence Ordinance, although this was not argued before us. One such verbal variation can, however, be accepted without difficulty as being collateral to and not inconsistent with the written contract, and that is an arrangement whereby on the purchase of the various properties and their registration in the plaintiff's name the defendants were let into possession. It has been argued that in Suit 2 of 1934 no such agreement was ever alleged, but it was alleged in Suit 7 of 1934 and it is not disputed by the plaintiff. But the defendants have alleged and the learned trial Judge has found another verbal agreement, namely that the plaintiff, as registered owner, had agreed to deprive himself of his *prima facie* right to take possession at any time, and that accordingly the defendants had the right to remain in possession indefinitely, whether or not they defaulted in payment of interest or in any other way. Now to my mind an alleged agreement of this character, which would go far to deprive the plaintiff of his security and would accordingly be inconsistent with the whole object of the transaction should only be accepted on the very strictest proof. In the present case no such agreement was ever alleged in the pleadings, and this fact alone would warrant such issue being decided against the defendants since evidence of a contract not pleaded is *prima facie* irrelevant. I will however consider the evidence. It has already been pointed out that the only agreement alleged was a verbal agreement between the defendants and the two representatives of the firm of A.M.M. on the occasion of each purchase that the defendant should have possession.

The evidence of Seenivasagam is as follows:—

"When the Karak property was purchased in the name of the Chetty it was agreed verbally that I should have possession.

When the 61 acres was purchased in the name of the Chetty it was agreed verbally that I should have possession.

There was a similar verbal agreement in respect of the Sungei Cheroh Estate." and:

"It was agreed that we should go into possession of the estate purchased. We went into possession from the dates of the respective purchases. I mean we assumed control." and later:

"The estates (we mutually agreed) were to be in my control." The last sentence no doubt means that the defendants mutually agreed between themselves.

In cross-examination Seenivasagam says that he made the arrangement with Sithambaram Chetty in the case of the Karak and Cheroh Estates and with Sevugam Chetty in the case of the Bentong Estate. Then he proceeds:

"The agreement was that I should have full control and management of these properties from the time they were registered in the plaintiff's name. I claim that I was entitled to remain in possession whatever I did.

I think I was entitled to remain in possession even though I took the proceeds and paid the Chetty no interest. This land was the Chetty's security. If I mismanaged the estate I should depreciate his security. If I did not pay interest would accumulate, and my debt increase.

There was no agreement that he should take possession if my interest fell in arrear or I mismanaged the estate."

It will be seen that Seenivasagam never alleged that the plaintiff agreed that Seenivasagam should remain in possession whatever happened. Seenivasagam merely suggests, as a matter of argument, that after having been let into possession originally, he was entitled to remain in possession for ever. It will also be noticed that Seenivasagam's evidence is to the effect that the different agreements were made between him and one of the representatives of the firm. This is entirely contrary to the particulars.

[233] The other defendants in Suit 2 of 1934 and Suit 7 of 1934 were called as witnesses but none [233] of them gave evidence of any agreement at all, not even an agreement to be let into possession in the first instance. Paramanathar does however make one significant statement when he says:—

"The Chetty was in possession. He had taken over the estate contrary to our wish." If there had been an express contract surely he would have known of it and said so.

The plaintiff, on the other hand, denied that there was any arrangement of the sort, and Suriamurthi one of the plaintiff's attorneys stated that there was no talk at all about the possession of the estates, and was not even cross-examined on the point. Similarly Sevugam Chettiar, who had been employed in the firm of A.M.M. for 15 years and became agent of the firm in 1930, also states that there was no discussion as to possession when the receipts containing the agreement to retransfer on payment were signed, and he repeated this in cross-examination.

It will be seen therefore that the evidence on the subject is almost entirely negative, and the learned trial Judge so finds. He accepts the statement of Seenivasagam that there was no specific agreement that the plaintiff should be entitled to go into possession if the interest fell into arrears, and relies on the fact that the written receipts did not reserve to the

A plaintiff any power of re-entry. But in the case of a legal owner, is any such reservation necessary? A right to possession is one of the normal incidents of registered ownership, and the learned Judge's findings depend entirely on the fact that he considered that the plaintiff should prove his right of re-entry, and not that the defendants should prove that he had abandoned such right. I think it may safely be inferred that if the learned Judge had placed the onus on the defendants, he could only have come to the conclusion that the defendants had failed to establish any restriction or diminution of the plaintiff's normal rights. In further support of this view it may be pointed out that in his letters from Ceylon when Seenivasagam heard that the plaintiff had turned Ponniah out, he only complains of "the arrangements being upset" and of not wishing to hurt Ponniah's feelings. Not a word is said of the plaintiff having committed a breach of a specific agreement, and in fact, for over two years after the plaintiff went into possession, the defendants took no steps in the matter at all. The only demand for possession that is pleaded was in respect of the Karak and Cheroh Estates and that demand was not made until April, 1934, after the plaints in Suits 1 of 1934 and 2 of 1934 had already been filed. I conclude, therefore, that the original occupation by the defendants was purely permissive, and that the position of the plaintiff was analogous to that of a legal mortgagee who has left the mortgagor in possession, and is entitled to enter into possession himself at any moment, the mortgagor being treated, either as a trespasser or tenant on sufferance—*Roby v. Maisey*, 108 E.R., 1228 and *Fisher's Law of Mortgage*, 6th ed., p. 651.

Now, as I have pointed out, the defendants' final claim against the plaintiff was in trespass and trespass only. The argument as to the plaintiff being a trustee was only brought in so as to try to establish the beneficial ownership of the defendants and from this the defendants ask the Court to infer that the beneficial ownership has attached to it all the incidents and privileges of legal ownership. Under a system of registration of titles this is not, however, the case, and would not be so even if all the money had been paid and the plaintiff had become a bare trustee. In such a case all that the defendants could have done would have been to call for a transfer, and, when they had been registered and not till then, would the incidents and privileges of ownership have vested in them. The defendants certainly did not say in so many words that the plaintiff was a "bare trustee" and in view of the fact that they could not call for a transfer until the money due had been paid, they no doubt felt that such a submission could not be supported. In the same way, although the learned trial Judge finds that the plaintiff is a trustee, he holds that he was a "trustee subject to a debt." With all respect to the learned Judge I do not quite follow what this expression means. If it means that the plaintiff would be a trustee after the debts had been paid, I fully agree, but I do not think that this is what is meant, and if the debts were still outstanding I do not think it is correct to describe the plaintiff as a trustee at all, any more than in England a legal mortgagee, whose debt

is outstanding, is a trustee for his mortgagor. As regards trespass, I do not think that an action in trespass will lie at all against a legal owner. No such case is cited in any of the text books, except when a tenant brings an action for trespass in respect of an illegal distress, which is of course quite a different matter. In my opinion, therefore, the claim in trespass, even if it could be supported on the pleadings (which I very much doubt) is entirely misconceived, and as a result the counterclaims should have been dismissed.

[234] It only remains to deal with the cross-appeals. As regards Paramanathar's cross-appeal (Suit 2 of 1934), it is argued that 'salary' means pensionable salary, but there is nothing in the Enactment which restricts the meaning of salary in any way. Paramanathar was in receipt of an extra allowance of 10 per cent. This was paid monthly and brought his actual receipts up to [234] \$165 p.m. and I think that *prima facie* the word 'salary' would cover the actual monthly payments which Paramanathar was receiving.

There is admittedly no binding authority on the point, but an Enactment which purports to deprive a man's creditor of his ordinary rights is a penal statute so far as he is concerned and should be construed strictly against the debtor, and for this reason I would not be inclined to cut down the meaning of the word 'salary' to something less than Paramanathar was actually receiving by way of salary. The case of *Rex v. Lyon; ex parte Harrison*, [1921] 1 K.B. 203 which is relied on by the learned President of the Court, appears to me to have no application. I would respectfully point out that in that case a special duty grant was approved by a Committee of the London County Council on the 28th February, 1919 in respect of the year ending March 31st, 1919, and was subsequently paid. The Court held that such special duty grant was part of the recipient's 'emoluments.' The question whether such grant was part of the recipient's 'salary' never arose and if it had, the decision would have had no application as the special duty grant was an isolated payment made at the end of the financial year in respect of duties already performed. It was not, as here, an addition to the monthly wages or salary and forming part of the recipient's regular remuneration.

A case more in point is that of *In re Klein; ex parte Goodwin* (1906), 22 T.L.R. 664. In that case a commercial traveller in receipt of a salary of £2-0-0 a week and a commission of 3½% on all business done by him, claimed a sum of £24-12-3 as a preferential debt against the estate of his employer who was a bankrupt. The whole of the £24-12-3 represented a balance due in respect of his commission and no part of it was his actual salary. It was held that such commission was part of the claimant's 'wages or salary' within the meaning of section 1, subsection (1)(b) of the preferential payments in Bankruptcy Act, 1888. If a varying sum due for commission can be regarded as salary, *a fortiori* an additional payment, received monthly and as part of a person's regular remuneration, must also be regarded as salary.

A For these reasons I agree with the learned trial Judge that Paramanathar cannot bring himself within the provisions of the Enactment and I would accordingly dismiss his cross appeal.

B As regards the appeals of Arumugam and Karthigasu, the second and third defendants in Suit 7 of 1934, the case is different. Their salaries were admittedly under \$150 a month, but the learned Judge has held that what they were engaged in was a "commercial transaction" and that accordingly upon the authority of *Abdul Kader v. Keap Kee & Co.*, 3 F.M.S.L.R. 201, they could not rely on the Enactment. No doubt this being a Court of Appeal decision, was binding on the learned Judge, provided that the authority covered the point raised now. The Enactment, however, is absolute in its terms and does not exclude 'commercial transactions,' and in any case the authority cited involves quite different facts and I do not think that the principle of that case should be extended. I would, therefore, allow the cross appeals in Suit 7 of 1934.

D It must, however, be recognised that on the learned Judge's findings of fact, the plaintiff was guilty of mismanagement and neglect while in possession of the estates, and, if they had framed their claim in a proper way, the defendants would certainly have been entitled to some relief. The position of the plaintiff is that he went into possession of estate in which the defendants had an equitable interest. In my opinion he was entitled so to do, but it is quite another matter whether in so doing he was wise. On entering into possession he at once took upon himself certain liabilities. The case of *Wragg v. Denham*, 160 E.R. 335, shows that a mortgagee in possession is chargeable with gross negligence, and in the circumstances of the present case I consider that the plaintiff should account on the footing of wilful default and be similarly chargeable. It must be remembered that this is not a case where houses have been allowed to fall into disrepair because there was no money to repair them. The plaintiff was in possession of an agricultural estate and clearly was not entitled merely to take the profits from the rubber, and allow the estate to go to wreck and ruin. Without making the plaintiff responsible for keeping up the estate to the highest possible standard, a certain minimum of care and cultivation was clearly necessary. It must be a matter of inquiry as to whether any or which acts or omissions by the plaintiff constituted such gross negligence as to make the plaintiff accountable therefor. I would accordingly set aside the orders to account made against the plaintiff in Suits 2 of 1934 and 7 of 1934, and direct accounts on the footing of wilful default, and inquiries as to the plaintiff's gross negligence while in possession of the three estates, other than Simpali. Upon such inquiries the evidence taken at the trial should be admissible, but the findings of the learned trial Judge cannot be regarded as conclusive, because in the Court below the plaintiff was treated as a trespasser, and in cases of trespass the measure of damages is the depreciated value of the property; whereas in cases of gross negligence, the plaintiff would only be liable for the acts and omissions actually proved against him, irrespective of the [235] extent to which the property had depreciated. Again, the

plaintiff would be prejudiced if the learned Judge's findings of fact were accepted, even so far as they were relevant, as an appeal was lodged against such findings, and it was only because the defendants never asked for the alternative relief which the Court considers appropriate, that this part of the appeal was never argued.

In the result therefore I would allow the plaintiff's appeal in Suit 1 of 1934 with costs in the Court of Appeal and below. The plaintiff will be entitled to an order in terms of the prayer in the amended plaint, and the lien will extend to the plaintiff's costs taxed under this order.

As regards Suit 5 of 1934, no appeal was lodged, but in view of the order of this Court there will be no sums to be set off under paragraphs 5(b) and 6(d) of the decree made thereon, and the decree must be varied accordingly.

In Suit 2 of 1934 the decree must be varied. Paragraphs 3, 4 and 5 must be set aside and in lieu thereof there must be an account and inquiry as indicated above, and the Registrar should report the result in the usual way. The order for payment in paragraphs 6 and 7 will be subject to any deductions in respect of sums found due by the plaintiff as the result of the accounts and inquiry ordered. Paragraph 8, the order for costs, and paragraph 9 can stand. The receiver must pass his final account and be discharged and possession must be restored to the plaintiff. Paragraph 11 can stand. The plaintiff will be entitled to the costs of the appeal, and as against the second defendant, of the second defendant's cross appeal.

As regards Suit 7 of 1934, the decree must be varied. The cross appeal of the second and third defendants will be allowed with costs and paragraph (1) of the decree must be varied by omitting the second and third defendants therefrom. Paragraphs (2) and (3) can stand. Paragraphs (4) and (5) will be set aside and in lieu thereof there will be an account and inquiry as indicated above. In paragraph (6) the Registrar will certify the result of such account and inquiry. Paragraphs 7 and 8 will be set aside. Paragraphs 9 and 10 should be varied by deducting from the amount payable by the first defendant and fourth defendant the amount certified by the Registrar on taking the accounts and inquiries and by omitting paragraphs 9(c) and 10(c). Paragraph 11(a) can stand. Paragraphs 11(b), 11(c) and 11(d) should be set aside; any costs paid under paragraph 11(b) must be repaid. The costs of the issues as to damages in the Court below must be reserved until the further consideration of the action after the taking of the accounts and inquiries directed by the order of this Court in Suits 2 of 1934 and 7 of 1934. The second and third defendants will be entitled to the costs of the issues upon which they have succeeded in their cross appeal. The costs of the accounts and inquiries ordered will be reserved. Paragraph 12 should be varied by omitting the names of the second and third defendants. Paragraph 13 can stand. As to paragraph 14 the receiver should pass his final account and be restored to the plaintiff. Paragraph 15 can stand.

A I would grant a certificate for two counsel in the case of each of the taxations ordered.

Howes J.: I have had the opportunity of reading the judgment which Terrell J. has written. He has expressed so fully my own opinion upon the case that it would be of no service for me to write an independent one. I accordingly concur with his judgment and have nothing to add.

LANSI BIN KAMAN & ANOR. v. SIAH BINTI HAJI TAAT

[A.C.J. (Aitken J.) June 3, 1936]

[Negri Sembilan Magistrate's Civil Appeal No. 4 of 1936]

Contract Enactment (Cap. 52), s.45 — Discharge of one of two joint promisees.

Lansi sued the defendant-respondent in his personal capacity and as administrator of the estate of his deceased father, Kaman, for a sum of \$460, which the defendant-respondent had acknowledged in writing to be due both to Lansi and Kaman. Before Kaman died he released the defendant-respondent from that part of the debt due to him.

Lansi claimed the whole debt of the \$460 on the ground that section 45 of the Contract Enactment (Cap. 52) rendered any release by one only of two joint promisees void and inoperative.

Held: that the release by Kaman was valid and that Lansi was only entitled to judgment against the defendant-respondent in the sum of \$230.

Annappurnamma v. Akkaya, (1913) I.L.R. 36 Mad. 544, considered.

E. Jeff for the plaintiffs-appellants.

M. Farr for the defendant-respondent.

Cur. Adv. Vult.

Aitken J.: The facts out of which this Civil Appeal arises, so far as they are disclosed by the evidence on the record, may be stated concisely as follows:—

[236] The plaintiff is suing both in his personal capacity and as the administrator of the estate of his late father, Kaman bin Katib, who died intestate some time in the latter part of the year 1933. His mother died before his father, apparently early in the year 1932, and some considerable time before her death—according to the defendant in or about the year 1926—the plaintiff's father lent the defendant, who was his niece, a sum of \$460 out of moneys which really belonged to his wife (the plaintiff's mother). This money was lent to the defendant for the purpose of enabling her to buy some padi land at a place called Tanjong Kling, near Rembau, and she bought the land from one Kesom for \$500 though why she did so is by no means clear. At that time the defendant was a married woman living far away at a place called Sungei Siput in Perak, and she has continued to live there up to to-day. She was therefore in no position to farm the land herself, and I see no reason to doubt her statement that she bought the same at her uncle's request. At any rate it is not in dispute that it was her uncle who farmed the land and took all the produce and profits arising from it up to the time of his death. There is no evidence to shew what has been done about the same since then.